Richard ak Besi v Bangie (F) ak Asson @ Bangie (F) ak Asson & Ors

HIGH COURT (SIBU) — SUIT NO SBW-22NCvC-7/3 OF 2018
LIM HOCK LENG JC
22 MAY 2019

Civil Procedure — Pleadings — Failure to plead — Whether cause of action pleaded against third and fourth defendants — Whether particulars of fraud pleaded against third and fourth defendants — Whether omission fatal

Land Law — Sale of land — Specific performance — Whether plaintiff paid deposit of RM50,000 — Whether first defendant forged or caused plaintiff's signature to be forged on withdrawal of caveat form — Whether plaintiff entitled to decree of specific performance and/or damages — Whether plaintiff's claim defeated by limitation

This was an action by the plaintiff for the following: (a) against the first defendant for specific performance, in the alternative, a refund for the deposit of RM50,000; (b) against the first and second defendants for having forged his signature on the withdrawal of caveat form which had enabled the transfer of the subject land from the first defendant to the third defendant; (c) the plaintiff sought an order for the fourth defendant to transfer the subject land to the plaintiff as well as several declarations leading up to that order; and (d) a declaration that the MOT in favour of the third and fourth defendants be declared null and void. The plaintiff had agreed to purchase part of the first defendant's undivided share of a parcel of land ('the subject land'). The plaintiff and the first defendant executed a sale and purchase agreement ('the SPA') over the subject land. Before the signing of the SPA the plaintiff lodged a caveat at the Sibu Land Registry and the MOT was undated, unstamped and it was never registered. The subject land was never transferred to the plaintiff. A withdrawal of caveat form was seemingly signed by the plaintiff on 13 March 2012 and registered on the same day, and the registration noted on the title on 2 April 2012, the signature on the form was attested by the second defendant. The subject land was sold by the first defendant to the third defendant for RM210,000 and the transfer was registered on 2 April 2012. The third defendant then sold and transferred the subject land to the fourth defendant for RM280,000 and the transfer of the subject land was registered on 27 April 2013. The plaintiff claimed that on 25 November 2014, he discovered that his signature on the withdrawal of caveat form had been forged and that the first and second defendants had deceived and defrauded the Registrar of Land and Survey Department into withdrawing the plaintiff's caveat which enabled the

subject land to be transferred to the third defendant and thereafter to the fourth defendant. The issues to be determined were as followed: (i) whether the plaintiff had paid the deposit of RM50,000; (ii) whether the first defendant had forged or had caused the plaintiff's signature to be forged on the withdrawal of caveat form; (iii) whether the plaintiff was entitled to a decree of specific performance and/or damages; and (iv) whether the plaintiff's claim was defeated by limitation.

Held, dismissing the application with costs of RM20,000 to the first defendant and RM20,000 to the third and fourth defendants subject to allocator fee:

(1) The amended statement of claim showed that there was no cause of action pleaded against the third and fourth defendants. In any case, no particulars of fraud were pleaded against the third and fourth defendants. This omission was fatal (see paras 12 & 14).

(2) The court relied on the SPA which was a contemporaneous document, evidencing the first defendant's receipt of the deposit. Clause 3.1 of the SPA stated that 'Upon signing hereof the vendor hereby acknowledges receipt of the sum of RINGGIT MALAYSIA FIFTY THOUSAND (RM50,000) ONLY'. PW2 was a party with no interest in the outcome of the case, as such, the court accepted his evidence that he had explained the contents of the SPA to both parties before they signed it. Further, it was more probable than not that the plaintiff had paid the deposit to the first defendant, otherwise she would not have signed the MOT which she admitted (see paras 24–25 & 34).

(3) Had the plaintiff produced the original withdrawal of caveat form or subpoenaed a member of the staff from the Land and Survey Department to produce it, and have it admitted and marked as an exhibit, the plaintiff may well have been able to make more of the fact that the second defendant was asked by the first defendant to attest the signature without the plaintiff having signed in his presence. The plaintiff had not proved on the balance of probabilities that his signature of the withdrawal of caveat form was forged by the first defendant or caused to be forged by her (see paras 46–47).

(4) The plaintiff failed to plead that he was ready, able and willing to perform his obligations under the SPA. The omission disentitled him from an order for specific performance. The plaintiff did not take steps to submit and register the MOT which was not even dated and stamped. This led to the irresistible conclusion that he was not ready, able and willing to perform his part of the bargain, as a result the decree for specific performance was unavailable to him (see paras 48, 50 & 55).

(5) The plaintiff was not entitled to a refund of the deposit or to general damages, as the cause of action pleaded was confined to forgery and fraud

by the first and second defendants which he had not been able to prove. While the plaintiff's prayers include a claim for the refund of the deposit and general damages, he had not pleaded and proved a cause of action which entitled him to the refund and general damages (see para 58).

(6) It was an indisputable fact that the plaintiff discovered the alleged forgery and fraud on 25 November 2014 but only filed the action herein on 3 May 2018. There were specific provisions in the Sarawak Limitation Ordinance which were applicable to the plaintiff's causes of action. The plaintiff's causes of action were predicated on fraud and forgery whereby the period of limitation was three years. The plaintiff's case was therefore statute barred (see paras 62, 64 & 68).

[Bahasa Malaysia summary

Ini merupakan tindakan plaintif untuk seperti yang berikut: (a) terhadap defendan pertama untuk perlaksanaan spesifik, atau secara alternatif pemulangan deposit RM50,000; (b) terhadap defendan pertama dan kedua yang dikatakan telah memalsukan tandatangannya pada borang kaveat yang membenarkan pemindahan hartanah tersebut daripada defendan pertama kepada defendan ketiga; (c) plaintif memohon untuk satu perintah agar defendan keempat memindahkan tanah tersebut kepada plaintif dan juga beberapa deklarasi yang membawa kepada perintah tersebut; dan (d) satu deklarasi bahawa MOT yang memihak kepada defendan ketiga dan keempat diisytiharkan batal dan tidak sah. Plaintif telah bersetuju untuk membeli sebahagian daripada bahagian tidak dibahagi defendan pertama satu bidang tanah ('tanah tersebut'). Plaintif dan defendan pertama telah melaksanakan satu perjanjian jual beli ('PJB tersebut') terhadap tanah tersebut. Sebelum menandatangani PJB tersebut, plaintif telah memasukkan satu kaveat di Pendaftar Tanah Sibu dan MOT tersebut tidak bertarikh, tidak berstem dan tidak pernah didaftarkan. Tanah tersebut tidak pernah dipindahkan kepada plaintif. Satu penarikbalik borang kaveat kelihatan seperti telah ditandatangani oleh plaintif pada 13 Mac 2012 dan didaftarkan pada hari yang sama, dan pendaftaran menyatakan pada hak milik pada 2 April 2012, tandatangan pada borang tersebut telah diakusaksi oleh defendan kedua. Tanah tersebut telah dijual oleh defendan pertama kepada defendan ketiga untuk RM210,000 dan pemindahan tersebut telah didaftarkan pada 2 April 2012. Defendan ketiga kemudiannya menjual dan memindahkan tanah tersebut kepada defendan keempat untuk RM280,000 dan pemindahan tanah tersebut telah didaftarkan pada 27 April 2013. Plaintif menyatakan bahawa pada 25 November 2014, dia telah mendapati bahawa tandatangannya pada borang penarik balikan kaveat telah dipalsukan, dan defendan pertama dan kedua telah menipu dan melakukan frod terhadap pendaftar Jabatan Tanah dan Ukur untuk menarik balik kaveat plaintif yang membenarkan tanah tersebut dipindahkan kepada defendan ketiga dan kemudiannya defendan keempat. Isu untuk diputuskan adalah seperti berikut: (i) sama ada plaintif telah membayar deposit

RM50,000; (ii) sama ada defendan pertama telah memalsukan atau menyebabkan tandatangan plaintif dipalsukan pada borang penarik balikkan kaveat; (iii) sama ada plaintif berhak untuk satu dekri pelaksanaan spesifik dan/atau ganti rugi; dan (iv) sama ada tuntutan plaintif dihalang oleh had masa.

Diputuskan, mengetepikan tuntutan dengan kos RM20,000 kepada defendan pertama dan RM20,000 kepada defendan kedua dan ketiga tertakluk kepada fi alokatur.

(1) Penyataan tuntutan terpinda menunjukan bahawa tiada kausa tindakan diplid terhadap defendan ketiga dan keempat. Dalam apa keadaan sekalipun, tiada butiran frod telah diplid terhadap defendan ketiga dan keempat. Peninggalan ini adalah fatal (lihat perenggan 12 & 14).

(2) Mahkamah bergantung kepada PJB yang merupakan satu dokumen semasa, membuktikan penerimaan defendan pertama terhadap deposit. Klausa 3.1 PJB mennyatakan 'Upon signing hereof the vendor hereby acknowledges receipt of the sum of RINGGIT MALAYSIA FIFTY THOUSAND (RM50,000) ONLY'. PW2 merupakan satu pihak yang tiada kepentingan dalam keputusan kes, oleh itu, mahkamah menerima keterangannya yang dia telah menjelaskan kandungan PJB kepada kedua-dua pihak sebelum mereka menandatanganinya. Lanjutan itu, ianya berkebarangkalian bahawa plaintif telah membayar deposit kepada defendan pertama, kerana jika tidak, dia tidak akan menandatangani MOT yang mana diakuinya (lihat perenggan 24–25 & 34).

(3) Sekiranya plaintif mengemukakan borang penarikbalikkan kaveat yang asal atau menyapina ahli staf Jabatan Tanah dan Ukur untuk mengemukakannya, maka ianya akan diterima dan ditanda sebagai ekshibit, dan plaintif mungkin boleh berjaya menunjukan fakta bahawa defendan kedua telah disuruh oleh defendan pertama untuk mengakusaksi tandatangan tersebut tanpa plaintif menandatanganinya dalam kehadirannya. Plaintif tidak membuktikan atas imbangan kebarangkalian bahawa tandatangannya pada borang penarikbalikan kaveat telah dipalsukan oleh defendan pertama atau telah menyebabkan ianya dipalsukan (lihat perenggan 46–47)

(4) Plaintif gagal untuk memplid bahwa dia bersedia, mampu dan sudi untuk melaksanakan tanggungjawabnya dibawah PJB. Peninggalan ini menyebabkan plaintif tidak berhak untuk mendapatkan satu perintah pelaksanaan spesifik. Plaintif tidak mengambil langkah-langkah untuk menyerahkan dan mendaftarkan MOT tersebut yang tidak ditarikhkan dan distem. Ini membawa kepada kesimpulan yang mendesak bahawa plaintif tidak bersedia, mampu atau sudi untuk melaksanakan bahagiannya, yang membawa kepada dekri pelaksanaan spesifik tidak ada kepadanya (lihat perenggan 48, 50 & 55).

(5) Plaintif tidak berhak kepada pemulangan semula deposit atau kepada ganti rugi am, memandangkan kausa tindakan yang diplid dihadkan kepada pemalsuan dan frod oleh defendan pertama dan kedua yang mana dia tidak berjaya untuk membuktikannya. Walaupun permohonan plaintif meliputi tuntutan untuk pemulangan deposit dan ganti rugi am, dia tidak memplid dan membuktikan kausa tindakan yang melayakkannya menerima pemulangan atau ganti rugi am (lihat perenggan 58).

(6) Ianya fakta yang tidak dinafikan bahawa plaintif mendapat bahawa pemalsuan dan frod yang kononnya dilakukan pada 25 November 2014 tetapi hanya memfailkan tindakan di sini pada 3 Mei 2018. Wujud peruntukan spesifik dibawah Ordinan Had Masa Sarawak yang terpakai kepada kausa tindakan plaintif. Kausa tindakan plaintif berasaskan frod dan pemalsuan yang mana tempoh had masanya adalah tiga tahun. Kes plaintif adalah dengan itu dihalang oleh statut (lihat perenggan 62, 64 dan 68).]

Notes

For cases on specific performance, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5451–5500.

For cases on failure to plead, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7482–7490.

Cases referred to

American Express International Banking Corp v Tan Loon Swan [1992] 1 MLJ 727; [1992] 1 CLJ 1, SC (refd)

Chiew Vui Kiet & Anor v Chong Fook Tien & Ors [1971] 2 MLJ 158; [1971] 1 LNS 19, FC (distd)

Exsim Development Sdn Bhd v Thiruselvam a/l VK Marimuthu [2018] MLJU 1926; [2018] 1 LNS 1314, HC (refd)

Fatimah Ahmad & Ors v Mohd Saad Ahmad & Anor [2016] 1 LNS 216, HC (refd)

Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290; [1984] 1 CLJ 123, FC (refd)

Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd) [2008] 2 MLJ 773, CA (refd)

K Umar Kandha Rajah v EL Magness [1985] 1 MLJ 116, FC (refd)

Koh Yat Chong & Anor v Koh Chin Lean Plantation Sdn Bhd & Anor [2014] 1 LNS 58, HC (refd)

Lim Ah Kow @ Lim Seck Tack & Anor v Blue Valley Plantation Berhad [2013] 1 LNS 937, HC (refd)

Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors [1982] 1 MLJ 198; [1982] CLJ Rep 217, FC (refd)

Penang Development Corporation v Khaw Chin Boo & Anor [1993] 2 MLJ 161, HC (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
South Asia Noble Sdn Bhd v Corak Prospek Binaan Sdn Bhd & Anor [2018] MLJU 1260; [2018] 1 LNS 1324, HC (refd)
Suwaya bte Buang & Ors v Yuh @ Abdul Salleh bin Pompulu [2018] MLJU 890, CA (distd)
The Rajah of Bobbili v Inuganti China Sitaramasami Garu [1899] 26 Ind App 262, PC (refd)
Yeoh Eng Kong v Choo Kok Yeow & Anor [2019] 9 MLJ 112; [2018] 10 CLJ 659, HC (refd)
Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors [2014] 2 MLJ 799; [2014] 2 CLJ 445, FC (refd)

Legislation referred to

Contracts Act 1950 s 47
Indian Stamp Act 1899 [IND]
Rules of the High Court 1980 O 18 r 12(1)(a)
Sarawak Limitation Ordinance Schedule, item 112
Stamp Act 1949 ss 12, 52(i)
Subordinate Courts Act 1948 s 71

Wong Yee Ping (Yap Hoi Liong with her) (Yap Hoi Liong & Co) for the plaintiff.
Danny Huang (Huang & Co) for the first defendant.
Augustine Liom (Tang & Co) for the second defendant.
William Ting (Yvonne Sia with him) (Tang & Partners) for the third and fourth defendants.

Lim Hock Leng JC:

THE SPA BETWEEN THE PLAINTIFF AND THE FIRST DEFENDANT

[1] The plaintiff had agreed to purchase part of the first defendant's 876/3416 undivided share of a parcel of land situate in Ulu Salim, Sibu, Sarawak, that is, 600/3416 of the land ('the subject land') which as a whole measures 13.84 hectares and is described as Lot 658, Block 1, Menyan Land District, Sibu, Sarawak.

[2] The plaintiff and the first defendant executed a sale and purchase agreement in writing dated 27 November 2007 over the subject land ('the SPA').

[3] It was provided in the schedule of payment that:

3.1 Upon signing hereof the Vendor hereby acknowledges receipt of the sum of

RINGGIT MALAYSIA FIFTY THOUSAND (RM50,000-00) ONLY.

3.2 The balance sum of RINGGIT MALAYSIA SIXTEEN THOUSAND (RM16,000-00) ONLY (hereinafter referred to as 'the Balance Sum') shall be paid by the Purchaser to the Vendor and/or the Vendor's solicitors upon the issuance of the Form L in respect of the Memorandum of Transfer of the Property in favour of the Purchaser or their nominees.

[4] Before the signing of the SPA, the plaintiff lodged a caveat at the Sibu Land Registry which was registered on 5 October 2007.

[5] The plaintiff signed the memorandum of transfer as the transferee of the subject land, while the first defendant signed it as the transferor. The MOT was undated and unstamped. It was never registered. The subject land was never transferred to the plaintiff.

WITHDRAWAL OF CAVEAT FORM OVER THE SUBJECT LAND, ATTESTED BY SECOND DEFENDANT

[6] A withdrawal of caveat form seemingly signed by the plaintiff on 13 March 2012 was registered on the same day at the Sibu Land Registry Office, and the registration noted on the title on 2 April 2012. The signature on that form was attested by the second defendant, a solicitor and advocate.

SUBJECT LAND TRANSFERRED TO THIRD DEFENDANT

[7] The subject land was sold by the first defendant to the third defendant for RM210,000 in cash and the transfer of the subject land was registered on 2 April 2012.

SUBJECT LAND TRANSFERRED BY THIRD DEFENDANT TO FOURTH DEFENDANT

[8] The third defendant in turn sold and transferred the subject land to the fourth defendant for RM280,000 in cash, and the transfer of the subject land was registered on 27 April 2013.

DISCOVERY OF FORGERY AND FRAUD ON 25 NOVEMBER 2014

[9] The plaintiff claims that on 25 November 2014, he discovered that his signature on the withdrawal of caveat form had been forged and that the first and second defendants had deceived and defrauded the Registrar of the Land and Survey Department in Sibu into withdrawing the plaintiff's caveat, which enabled the subject land to be transferred to the third defendant and thereafter, to the fourth defendant.

CAUSES OF ACTION, AND RELIEFS SOUGHT

[10] Having discovered the alleged forgery and fraud on 25 November 2014, the plaintiff instituted the action herein on 3 May 2018.

[11] As against the first defendant, the plaintiff sues for specific performance and, in the alternative, a refund of the deposit of RM50,000. He sued both the first and second defendants for having forged his signature on the withdrawal of caveat form, which had enabled the transfer of the subject land from the first defendant to the third defendant.

[12] A perusal of the amended statement of claim shows that there is no cause of action pleaded against the third and fourth defendants. In para 13, the plaintiff alleges that 'the first defendant had secretly and fraudulently transferred the said land to (the) third defendant' despite the first defendant having agreed to sell the subject land to the plaintiff. He further alleges that the first defendant intentionally and/or fraudulently transferred the subject land to the third and fourth defendants. The plaintiff alleges that 'the negligent act of the second defendant had caused the (subject) land (to be) fraudulently transferred to (the) fourth defendant'. Similar allegations are then repeated against the first and second defendants. See BP, paras 13–15.

[13] By no stretch of the imagination can there be said to any reasonable or discernible cause of action pleaded against the third and fourth defendants.

[14] In any case, no particulars of fraud were pleaded as against the third and fourth defendants. The omission is fatal. In this regard, reference may be made to *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799 at pp 812–813; [2014] 2 CLJ 445 at pp 461–462 where the Federal Court held:

> ... In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see O 18 r 12(1)(a) of the Rules of the High Court 1980, now Rules of Court 2012). 'When fraud is alleged it must be specifically pleaded. (The) mere allegation of fraud without showing facts to support it is not a matter to which the court will pay serious attention (*Wallingford v Mutual Society and Official Liquidator* (1880) 5 App Cas 685 at p 697. The party need not use the word 'fraud' if he pleads, in unambiguous language, acts which amount in law to fraud (*Myddleton v Lord Kenyon* (1794) 2 Ves 391 at p 412). Whenever fraud or misrepresentation is alleged in a pleading, or any affidavit, full particulars of the alleged fraud or misrepresentation must be given' (Spenser Bower, Turner and Handley, Actionable Misrepresentation, 4th Ed at pp 384–385).
>
> *In Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672; [2010] 2 CLJ 703, Gopal Sri Ram JCA, as he then was, summarised the law as follows:

The defendant alleged that the transfer to the plaintiffs by their father was by way of fraud, but no particulars were pleaded in the statement of defence or the counterclaim, it is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. In the High Court case of *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715; [1994] 4 CLJ 558 it was held by the High Court that it is established law that the expression fraud cannot be generally or vaguely pleaded. In *Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193; [1988] 1 CLJ 619; [1988] 1 CLJ Rep 717 the High Court held that a general allegation of fraud is insufficient event to amount to averment of fraud. There is good reason why fraud must be specifically pleaded and required in O 18 r 8(1) of the RHC. It is not to take the other party by surprise. In fact Lord Denning MR in *Associated Leisure Ltd & Ors v Associated Newspapers Ltd* [1970] 2 QB 450 said that 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it'.

The reason for fraud to be pleaded with particulars is because 'the word 'fraud' does not mean anything more than what is stated. When you plead fraud, the particulars must be pleaded ... mere general allegations of fraud are insufficient to constitute a pleaded case of fraud' (*Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor* [2011] 1 MLJ 752; [2011] 1 CLJ 491 per Abdul Malik Ishak JCA).

[15] Nonetheless, the plaintiff sought an order for the fourth defendant to forthwith transfer the subject land to the plaintiff, as well as various declarations leading up to that order, inter alia, the withdrawal of caveat form is null and void and is to be set aside while the plaintiff's caveat is to be treated as subsisting. The plaintiff asked for a declaration that the memoranda of transfer in favour of the third and fourth defendants be set aside on the basis that they are null and void.

[16] Although the value of the subject land is within the monetary jurisdiction of the sessions court, the title and ownership of the subject land is in dispute. That entails adjudication of the dispute in the High Court. See s 71 of the Subordinate Courts Act 1948.

[17] Returning to the mainstream narrative on the plaintiff's action against the first and second defendants, it needs to be mentioned that the plaintiff discontinued his action against the second defendant when the trial started. It was thus that the second defendant gave evidence for the plaintiff. Although the second defendant had in his defence insisted that the plaintiff had signed the withdrawal of caveat form, he testified that he did not see the plaintiff sign the form but had attested it on the request of the first defendant. See WSPW-3 and NOP, Q&A 158 and 162–163.

ISSUES

[18] The issues in this case are:

(a) whether the plaintiff had paid the deposit of RM50,000 to the first defendant;

(b) whether the first defendant forged or had caused the plaintiff's signature to be forged on the withdrawal of caveat form;

(c) whether the plaintiff is entitled to a decree of specific performance and/or damages; and

(d) whether the plaintiff's claim is defeated by limitation.

Witnesses, trial bundles and the trial

[19] There were six witnesses called and all of them relied on witness statements, details of which are as follows:

Plaintiff's witnesses	Marking of witness statement
Richard ak Besi (PW1)	WSPW1
Roger Lau Boung Kiong (PW2)	WSPW2
Louis Jarau ak Patrick (PW3)	WSPW3
Florence Teo Kim Sieng (PW4)	WSPW4

First defendant's witness	Marking of witness statement
Bangie Anak Asson (DW1)	WSDW1

Third defendant's witness	Marking of witness statement
Jampi Gramong	WSDW2

[20] The following documents were tendered:

Particulars of documents	Enclosure/Pages	Marking
Bundle of pleadings	72	BP
Common bundle of documents (agreed as to authenticity and contents)	79	CBA
Common bundle of documents (agreed as to authenticity only)	75	
Disputed bundle of documents	Bundle C (marked for reference only) 1–8 9 10–12	 P1 (1–8) P2 D1
Plaintiff's supplementary bundle of documents	92	CBB2

Stamp certificate of the sale and purchase agreement		P4

[21] The trial was held from 11–14 March 2019.

Issue (i): Whether the plaintiff had paid the deposit of RM50,000 to the first defendant

[22] The first defendant's position was that the plaintiff had not even paid her the deposit of RM50,000, and would not thus be entitled to specific performance and certainly, not a refund in the alternative. Learned counsel for the first defendant pointed out that the plaintiff failed to produce the payment voucher and receipt which he claimed to have in his possession, and that Roger Lau Buong Kiong, PW2, (who had prepared and attested the SPA) had accepted that he did not see the plaintiff paying the first defendant the RM50,000 in cash. See NOP, Q&A 134.

[23] These are what may be considered minor discrepancies in the testimony of the plaintiff ('PW1') and PW2. PW1 said that he paid the deposit in front of PW2 who however said that he did not see the payment being made. It is feasible that PW1 made the payment in the presence of PW2 who may have forgotten it or could not recall it as he had no financial interest in the payment. As to whether the deposit was RM50,000 excluding RM5,000 for legal fees and disbursements or inclusive of these costs, the transaction took place more than 11 years ago and a witness can be hardly expected to have perfect recall.

[24] I would instead rely on the SPA which is a contemporaneous document, evidencing the first defendant's receipt of the deposit. To recapitulate, cl 3.1 states that 'Upon signing hereof the Vendor hereby acknowledges receipt of the sum of RINGGIT MALAYSIA FIFTY THOUSAND (RM50,000-00) ONLY'.

[25] Further, I accept the evidence of PW2 who is a party with no interest in the outcome of the case. PW2 testified that he had explained the contents of the SPA to both parties before they signed it. The first defendant had instructed him to prepare the SPA.

See NOP, p 49, Q&A 146 and p 84, Q&A 217.

[26] If the first defendant had not received the deposit upon or shortly after the execution of the SPA, it would have been expected of her to ask for the deposit. Although the first defendant said that she never received any money and '*always*' went to see PW2/went to see PW2 three times, to ask him about

the matter (NOP, p 88, lines 23–27, p 89, lines 23–26), those alleged visits were never put to PW2 in cross-examination. A

[27] I find that it is more probable than not that the first defendant did not at any time, after the execution of the SPA, ask the plaintiff or PW2 for the deposit as she already received it. B

[28] PW2 also testified that:

> For the RM50,000 paid as deposit to Mdm Bangie, I did ask for her confirmation that she had received the money before her signing of the document. C

See NOP, Q&A 125.

[29] PW2 was unshaken under continued cross-examination and he maintained his recollection thus: D

> I had explained the contents of the document to Mdm Bangie and I had asked for her confirmation whether or not she had received RM50,000 before I asked Mdm Bangie to sign the Sale and Purchase Agreement. E

See NOP, Q&A 134.

[30] I also accept the testimony of PW2 on the original SPA which I considered, on a balance of probabilities, to have been misplaced. F

See NOP, p 74, Q&A 194–195.

[31] There is no merit to the first defendant's argument that she did not give her land title to PW2 because the deposit was not paid to her. This is because G the subject land was only 600/3416 part of her 876/3416 undivided share of the entire piece of land known as Lot 658, Block 1, Menyan Land District, Sibu, Sarawak, and there would not be a land title for it. See WSDW1, Q&A 7, and first defendant's written submission (encl 109), para 35. Even if the first defendant was referring to the title for the whole parcel of land, there is no H evidence that she had it in her hands, considering that her father, Ason ak Anggang was against her selling the subject land as it was considered a family heirloom.

[32] In accepting PW2's testimony, I do not accept the first defendant's I testimony that '(the SPA) was prepared by the plaintiff's lawyer and it was never explained to me. I only know that I was instructed to sign a set of documents before a lawyer but no deposit and/or any payment was paid to me after signing'.

[33] Indeed, the first defendant contradicted herself under cross-examination:

> Q216 I put it to you that you were the one who instructed Mr Roger Lau to prepare the Sale and Purchase Agreement as well as the Memorandum of Transfer in respect of the subject land. Am I correct to say so?
>
> A Yes, because Mr Besi want to buy my land.
>
> Q217 So, am I correct to say that Mr Roger Lau prepared the said Sale and Purchase Agreement based on the terms and conditions that you agreed in the land transaction of the subject land?
>
> A I agree.

See NOP, pp 83–84, Q&A 216–217.

[34] It is more probable than not that the plaintiff had paid the deposit of RM50,000 to the first defendant, otherwise she would not have signed the memorandum of transfer which she admitted.

See NOP, p 84, Q&A 219.

[35] It may be added that the SPA was only stamped on 13 March 2019, during the course of the trial, after learned counsel for the first defendant as well as learned counsel for the third and fourth defendants had objected to its admissibility. It was marked as exh P1, notwithstanding the objection that there was no evidence the original SPA had been stamped. See NOP, p 76, lines 12–26.

[36] Learned counsel for the first defendant relied on *Chiew Vui Kiet & Anor v Chong Fook Tien & Ors* [1971] 2 MLJ 158; [1971] 1 LNS 19 but that decision of the Federal Court, which was based on the Privy Council decision in *The Rajah of Bobbili v Inuganti China Sitaramasami Garu* [1899] 26 Ind App 262, can be distinguished. It was held by Ismail Khan CJ:

> In the instant case there is no evidence that the original had been stamped. It follows, therefore, that no secondary evidence can be offered of its terms even on payment of the duty and penalty, if any, for the provisions of the Stamp Ordinance regarding stamping of a document on payment apply only to the original document if produced.

[37] While the Indian authorities suggest that only an 'instrument', not a copy thereof, can be rendered admissible under the Indian Stamp Act 1899, the position in Malaysia is different.

[38] Section 52(i) of the Stamp Act 1949 provides: A

> No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped: Provided that: B
>
> (a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof under section 43 or 47A;

[39] Section 12 of the Stamp Act 1949 clarifies: C

> The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor) shall not be deemed to be duly stamped unless: D
>
> (a) it is stamped as an original instrument;
>
> (b) it appears by a certificate indorsed by the Collector on the duplicate or counterpart that full and proper duty has been paid on the original instrument; or E
>
> (c) there is denoted on the stamp certificate issued for the duplicate or counterpart that payment of the stamp duty has been paid in respect of the original instrument.

[40] The Indian Stamp Act 1899 makes no provision for the stamping of a duplicate, unlike s 12 of the Stamp Act 1949 in Malaysia. F

[41] A perusal of exh P4 (the stamp certificate) shows that the SPA was stamped on 13 March 2019 (the third day of trial) as an original or principal instrument. The words '*surat cara utama*' appear on exh P4. As such, the SPA G which was in Bundle C and marked as an ID was converted to exh P1, notwithstanding the earlier evidence by PW2 that the original SPA could have been misplaced when his firm moved office in 2010. There are also instances where the duplicate copies are treated as originals in the sense that the signatories affix their signatures on a few copies. See *Fatimah Ahmad & Ors v Mohd Saad Ahmad & Anor* [2016] 1 LNS 216. In any case, as mentioned H earlier, a duplicate can be stamped under s 12 of the Stamp Act 1949.

[42] Although it is not clear whether the unstamped guarantee in *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198; I [1982] CLJ Rep 217 and whether the unstamped loan agreement and the guarantee in *American Express International Banking Corporation v Tan Loon Swan* [1992] 1 MLJ 727; [1992] 1 CLJ 1 were originals or duplicates, the apex court in both cases took the approach that an unstamped instrument

becomes admissible upon stamping or the payment of the penalty, or upon an undertaking by the party seeking to admit the document that the requisite payment will be made. See also *Koh Yat Chong & Anor v Koh Chin Lean Plantation Sdn Bhd & Anor* [2014] 1 LNS 58 and *Exsim Development Sdn Bhd v Thiruselvam a/l VK Marimuthu* [2018] MLJU 1926; [2018] 1 LNS 1314 which appear to take a broader accommodative approach.

[43] As was explained by Salleh Abas FJ (as he then was) in *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors*, at p 220: 'The purpose of the Stamp Ordinance 1949 is to impose and to collect taxes on legal and commercial documents by compelling these documents to be stamped on pain of being inadmissible. The Ordinance provides that payment of duty can be made before or at the time when documents are executed, and even later except for certain type of documents'. It bears noting that the SPA in our instant case is not one of the documents which are inadmissible even if the penalty is paid later.

Issue (ii): Whether the first defendant forged or had caused the plaintiff's signature to be forged on the withdrawal of caveat form

[44] Learned counsel for the plaintiff submitted that her client was not cross-examined in respect of his purported signature on the withdrawal of caveat form, and the defendants must be taken to have accepted the plaintiff's testimony that he did not sign the form. It appears that she may have overlooked the notes of proceedings, as learned counsel for the first defendant did ask the plaintiff: 'Do you agree with me that you signed the document including the withdrawal of caveat at p 14 Bundle C - ID3?' See NOP, p 31, Q&A 93.

[45] It is imperative to note that the withdrawal of caveat form which contains the disputed signature was not marked as an exhibit. It was referred to throughout the trial as ID3. Learned counsel for the first defendant relied on *Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd)* [2008] 2 MLJ 773 where the Court of Appeal held: 'we are of the view that the third letter of demand cannot be considered at all because it was not tendered in court by any witness of respondent. It was only an identification document (ID) in the non agreed bundle and was never converted to a court exhibit' and also *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p 183 where Abdoolcader J (as he then was) held: 'it is necessary to refer to certain exhibits which has been put in the course of proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely D41 and D43 which were both put in for identification only … as these two exhibits have not been proved

and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto'.

[46] Had the plaintiff produced the original withdrawal of caveat form or subpoenaed a member of the staff from the Land & Survey Department to produce it, and have it admitted and marked as an exhibit, the plaintiff may well have been able to make more of the fact that the second defendant (PW3) was asked by the first defendant to attest the signature without the plaintiff having signed in his presence, and so on.

[47] As it is, the plaintiff has not proved on a balance of probabilities that his signature of the withdrawal of caveat form was forged by the first defendant or caused to be forged by her.

Issue (iii): Whether the plaintiff is entitled to a decree of specific performance and/or damages

[48] It is readily apparent from a perusal of the amended statement of claim that the plaintiff has failed to plead that that he is ready, able and willing to perform his obligations under the SPA, including the tender of the balance purchase price in the sum of RM16,000. The omission disentitles him from an order for specific performance.

[49] As was held by Lee Swee Seng JC (as he then was) in *Lim Ah Kow @ Lim Seck Tack & Anor v Blue Valley Plantation Berhad* [2013] 1 LNS 937:

> The plaintiffs have failed to plead that they were able, willing and ready to pay the balance purchase price. Such a failure to so plead is fatal. The Federal Court in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 1 CLJ Rep 123; [1984] 2 CLJ 268; [1984] 2 MLJ 290 at 297 spelt out this in no uncertain terms as follows:
>
> > Now, in a suit for specific performance, a party treated and was required by the court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit (see the dictum of Lord Blanesburgh in *Mama v Sassoon*) ...

[50] Apart from that cardinal point on pleading, the plaintiff did not take steps to submit and register the memorandum of transfer which was not even dated or stamped.

[51] Learned counsel for the plaintiff submits that the memorandum of

transfer could not be registered because of a caveat lodged by the first defendant's father registered on 5 November 2007 (CBB2, pp 1–3).

[52] That cannot possibly be correct after 29 September 2009, when the first defendant's father's caveat was withdrawn. In this regard, reference is made to the full print-out of the title deed which is found in CBA (encl 79), the contents of which are agreed as to authenticity and contents.

[53] There is then no good reason for the plaintiff not to proceed with the lodgement and registration of the memorandum of transfer, after the first defendant's father's caveat was withdrawn on 29 September 2009.

[54] In addition, the plaintiff did not adduce any evidence to establish that he had tendered or was in a position to tender the balance purchase price of RM16,000.

[55] The plaintiff's failure to lodge and register the memorandum of transfer and also to abide by the payment term leads to the inescapable conclusion that he was not ready able and willing to perform his part of the bargain, as a result of which a decree of specific performance is unavailable to him. The requirement of an unbroken continuity finds expression in the ratio expressed by the Federal Court in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 at p 297; [1984] 1 CLJ 123 at p 133:

> Now, in a suit for specific performance, a party treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part.

[56] In *K Umar Kandha Rajah v EL Magness* [1985] 1 MLJ 116 at p 119, the dispute concerned the sale of a parcel of land in respect of which the purchase price was to be paid in instalments. The purchaser had failed to pay the balance of the second instalment even after the expiration of the extended time and after he had sued for specific performance. The Federal Court, in upholding the trial judge's decision to dismiss the action for specific performance, held:

> (The purchaser/appellant) had at no time shown any readiness and willingness to perform his own obligation under the agreement which apart from any question of time was to pay the balance of the second and thereafter the third and final instalments both of which amounted to $20,000/- ie more than half of the total purchase price. He has also not made any arrangements to ensure that the respondent should eventually receive the whole of the purchase money. *In short he was not ready and willing to 'put the money on the table'* (*Tay Say Geok & Ors v H G Warren*). We are of the view that this is not a case where it is just and equitable to grant specific performance.

[57] As such, the plaintiff's claim for specific performance has to be dismissed. That leaves the question whether he is entitled to a refund of the deposit or to general damages.

[58] It would appear that the plaintiff is not entitled to a refund of the deposit or to general damages, as the cause of action pleaded is confined to forgery and fraud by the first and second defendants which he has not been able to prove. While the plaintiff's prayers include a claim for the refund of the deposit and general damages, he has not pleaded and proved a cause of action which entitles him to the refund and general damages. The plaintiff's pleaded case was predicated on the alleged forgery of his signature on the withdrawal of caveat form, and fraud. These causes of action were set out in paras 11–16 of his amended statement of claim. Paragraph 10 of the amended statement of claim ('it was mutual understanding that the transfer of the said land shall be affected forthwith and the first defendant assured the plaintiff that he would not sell the said land to third party without obtaining consent from the plaintiff') can hardly be said to be a pleaded cause of action, and even if it were otherwise, the plaintiff did not take any steps to effect transfer of the subject land forthwith, or at least, so soon as the first defendant's father's caveat had been lifted on 29 September 2009. The plaintiff's indolent conduct disentitles him from a decree of specific performance and in lieu thereof, damages.

[59] As learned counsel for the third and fourth defendants pointed out, relying on *Yeoh Eng Kong v Choo Kok Yeow & Anor* [2019] 9 MLJ 112; [2018] 10 CLJ 659: 'It is trite law that damages in lieu of specific performance are damages for the loss suffered by an innocent party, which would substitute the relief of specific performance, and they are awarded in order to place the innocent party in a position he would have been had the contract been performed as expected by him'.

[60] Reference was also made to *South Asia Noble Sdn Bhd v Corak Prospek Binaan Sdn Bhd & Anor* [2018] MLJU 1260; [2018] 1 LNS 1324 where Darryl Goon JC (as he then was) held:

> [101] A similar reasoning was provided by the Supreme Court of *New Zealand in Bosaid v Andry* [1963] VLR 465 where at p 484 Scholl J held that:
>
> > ... It was early established that the plaintiff, in order to recover such damages from the Court of Chancery, must show that he had a right to specific performance at the hearing, or at least that he had such a right save for the existence of a ground entitling the court in its discretion to refuse the equitable remedy. He could not get damages under the Act if the evidence showed that he had no right at all to specific performance ...

[61] On a side note and for completeness, I will deal with the third and

fourth defendants' argument that remedy of specific performance is not available to the plaintiff because there is no specific date fixed for the payment of the balance purchase price and the time to tender payment is accordingly uncertain. That cannot be the case, since the payment obligation is expressly hinged upon the issuance of the Form L in respect of the memorandum of transfer. Although there is no time mentioned for the memorandum of transfer to be submitted, the submission would have to, and need only, be made within a reasonable time. See s 47 of the Contracts Act 1950; and *Penang Development Corporation v Khaw Chin Boo & Anor* [1993] 2 MLJ 161. Briefly put, it is because of indolence, not uncertainty, that the plaintiff's action for specific performance fails.

Issue (iv): Whether the plaintiff's claim is defeated by limitation

[62] It is an indisputable fact that the plaintiff discovered the alleged forgery and fraud on 25 November 2014 (as pleaded in para 11 and elaborated upon in para 13 of his amended statement of claim) but only filed the action herein on 3 May 2018.

[63] In the plaintiff's reply submissions (encl 115), reliance is placed on item 112 of the Schedule to the Sarawak Limitation Ordinance. It was argued that the limitation period for possession of immovable property or any interest therein not otherwise provided in the Limitation Ordinance is 12 years. However, this is not a case where the plaintiff is seeking the recovery of possessory rights (such as a landlord seeking to recover possession from a tenant who has overstayed) but proprietary and other rights through specific performance and declarations.

[64] I do not think that I should subscribe to the plaintiff's argument as the causes of action giving rise to the reliefs sought unarguably accrued on 25 November 2014. There are specific provisions in the Limitation Ordinance which apply to the plaintiff's causes of action which are predicated on fraud and forgery. They are set out in the Schedule and are as follows:

First column	Second column description of suit	Third column period of limitation	Fourth column time from which period begins to run
72	To cancel or set aside an instrument not otherwise provided for	Three years	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him

73	To declare the forgery of an instrument issued or registered	Three years	When the issue or registration becomes known to the plaintiff
76	To set aside a decree obtained by fraud, or for other relief on the ground of fraud	Three years	When the fraud becomes known to the party wronged
90	For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused

[65] The Court of Appeal's decision in *Suwaya bte Buang & Ors v Yuh @ Abdul Salleh bin Pompulu* [2018] MLJU 890, which the plaintiff relied upon, can be distinguished. There, it was a triable issue as to when the cause of action accrued but in the case at hand, there can be no doubt as the date is admitted and pleaded by the plaintiff himself.

SUMMARY OF FINDINGS AND CONCLUSION

[66] Although the plaintiff had paid the deposit of RM50,000 to the first defendant, he is not entitled to a decree of specific performance as he has not pleaded or proven on a balance of probabilities that he is ready, able and willing to perform his obligations under the SPA. As against the third and fourth defendants, there is no case of fraud which can be said to have been made out.

[67] The plaintiff is not entitled to a refund or damages in lieu of specific performance because he had no right at all to specific performance, and also because he did not adequately plead alternative causes of action.

[68] In any case, the plaintiff's action is defeated by the pleas of limitation put up by the first, third and fourth defendants.

[69] The plaintiff's action is dismissed with costs of RM20,000 to the first defendant subject to payment of the allocatur fee. In respect of the second defendant, it will be recalled that the action against him was discontinued when the trial commenced. The plaintiff is to pay RM20,000 in total to the third and fourth defendants, subject to payment of the allocatur fee.

Application dismissed with cost of RM20,000 to the first defendant and RM20,000 to the third and fourth defendants subject to allocator fee.

Reported by Izzat Fauzan